AYER ITAM HEIGHT SDN BHD & ORS

v.

CHUNG NYUK SEN

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOFF JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: S-02-152-1997]
14 APRIL 2003

CIVIL PROCEDURE: *Action - Disposal of action - Preliminary questions of law - Answers to questions posed decisive of litigation - Full trial of other issues - Whether unnecessary - Whether earlier disposal of case proper - Rules of High Court 1980, O. 33 rr. 2, 3(2), 5*

By a deed dated 28 July 1984, the plaintiff transferred a piece of land to the first defendant ('D1') for it to be developed by the latter. D1 failed to develop the land and the plaintiff issued a writ against D1 as well as the guarantors to the deed. Subsequently, by order of court dated 12 February 1990, two questions of law were ordered to be tried first pursuant to O. 33 rr. 2, 3(2) & 5 Rules of the High Court 1980, whereupon the learned judge, in answering the questions posed, ruled, firstly, that D1 had breached cl. 4 of the deed when it failed to obtain the final approval for the development from the relevant authorities, and secondly, that the guarantors were not at liberty to invoke cl. 4 hereof and treat the deed as null and void, as that would amount to allowing D1 to take advantage of its own wrong. Based upon these answers, the learned judge proceeded to dispose of the writ action and refused to delve into the other issues raised by the defendants. The defendants appealed and argued that it was wrong of the learned judge to have disposed of the action the way he did, and that a full trial was necessary to try the other issues.

Held:
Per Mohd Saari Yusof JCA

[1] As was said in *Everett v. Ribbands* "**where there is a point of law which, if decided in one way, is going to be decisive of the litigation**, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards". In the instant case, it is abundantly clear that D1 had failed to take necessary

actions as envisaged under cl. 4 of the deed. That being so, it was not necessary for the court below to conduct a full trial to try the other issues on the basis that D1 was in breach of cl. 4 of the deed. (p 690 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes*

Melalui suatu suratikatan bertarikh 28 Julai 1984, plaintif telah memindahmilik satu hartanah kepada defendan pertama ('D1') untuk hartanah tersebut dimajukan oleh pihak terkemudian itu. Hartanah gagal dimajukan oleh D1, berakibat plaintif mengambil tindakan writ terhadap D1 serta penjamin-penjamin kepada suratikatan. Berikutnya, berdasarkan perintah mahkamah bertarikh 12 Februari 1990, dua persoalan undang-undang telah diperintah untuk dibicarakan dahulu mengikut A. 33 kk. 2, 3(2) & 5 Kaedah-kaedah Mahkamah Tinggi 1980, dimana hakim yang bijaksana, dalam menjawab soalan-soalan yang berbangkit, memutuskan, pertama, bahawa D1 telah melanggar fasal 4 suratikatan apabila ia gagal memperoleh kebenaran muktamad bagi pembangunan hartanah dari pihak berkuasa, dan kedua, bahawa penjamin-penjamin tidak boleh bergantung kepada fasal 4 untuk menganggap suratikatan sebagai tidak sah, kerana itu bermakna membenarkan D1 mendapat manfaat dari kesalahannya sendiri. Berlandaskan kepada jawapan-jawapan ini, hakim yang bijaksana bertindak melupuskan tindakan writ di sini dan seterusnya enggan mempertimbang isu-isu lain yang dibangkitkan oleh defendan-defendan. Defendan-defendan merayu dan berhujah bahawa hakim yang bijaksana adalah silap bilamana melupuskan tindakan seperti yang dibuatnya, dan bahawa satu perbicaraan penuh haruslah diadakan bagi membicarakan isu-isu lain yang dibangkit oleh mereka.

Diputuskan:
Oleh Mohd Saari Yusof HMR

[1] Sebagaimana yang dikatakan dalam *Everett v. Ribbands* "**dimana terdapat suatu halperkara undang-undang yang, jika diputuskan dengan suatu cara, akan memutuskan litigasi secara muktamad,** segala fasiliti yang terdapat dalam kaedah-kaedah mahkamah hendaklah diambil manfaat bagi melupuskan litigasi di akhir pliding ataupun tidak lama selepas itu". Dalam kes semasa, ianya amat jelas bahawa D1 telah gagal mengambil tindakan-tindakan perlu sebagaimana yang tertera dalam fasal 4 suratikatan. Oleh hal yang demikian, ianya tidak lagi perlu bagi mahkamah di bawah untuk mengadakan suatu perbicaraan penuh untuk mendengarbicara isu-siu lain berdasarkan pelanggaran fasal 4 suratikatan oleh D1 tersebut.

Rayuan ditolak.]

Case(s) referred to:
Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***
Everett v. Ribbands [1952] 1 All ER 823 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 33 rr. 2, 3(2), 5

For the appellants/defendants - Francis Wong; M/s Peter Lo & Co
For the respondent/plaintiff - Marina Tiu; M/s Yap Chin & Tiu

[Appeal from High Court, Sandakan; Suit No: S11-1989]

Reported by WA Sharif

JUDGMENT

Mohd Saari Yusoff JCA:
This is an action by the respondent ("the plaintiff) against the four appellants ("the defendants") for breach of contract. In the court below, the learned judge entered judgment for the plaintiff and the defendants were ordered to pay damages to be assessed and interest, hence this appeal.

Gist of the case is that at all material times, the plaintiff was the co-owner of undivided share of land held under Sandakan Lease No. 10266 (hereinafter referred to as "the said land"). Under a deed dated 28 July 1984 ("the deed") the plaintiff agreed to transfer the said land to the first defendant ("Dl") for development. The plaintiff had since transferred the said land to D1 but D1 had failed to develop the said land. The other defendants were guarantors to the deed.

On 11 March 1989, the plaintiff issued a writ against the defendants. By order of the court dated 12 February 1990 two questions of law were ordered to be tried first pursuant to O. 33 rr. 2, 3(2), 5 RHC 1980. The two questions are as follows:

(A) Whether upon a true construction of the deed dated 28 July 1984 (a copy of which is annexed hereto and marked "A1" to "A12" and to be referred to hereinafter as the deed) the final approval for the development of the Phase 1 project referred to in cl. 4 of the deed was:

    (I) obtained on 19 June 1984 when the Sandakan Municipal Council approved the building plans (No. S1182/12A to S1182/1/4A and No. S1182/2/2A to S1182/2/5 A); or

(II) obtained on 19 June 1984 when the Sandakan Municipal Council endorsed on the said building plans (No. S1182/1/2A to S1182/1/4A and No. S1182/2/2A to S1182/2/5A) the words: "Commencement of construction of buildings to be subjected to final approval of engineering development plans"; or

(III) obtained at all;

(B) Whether, assuming that there is no final approval for the development of the Phase I project, the defendants can rely on the failure of the 1st Defendants – to obtain or to apply at all for the final approval for the development of the Phase I project within six months of 28 July 1984 – to invoke cl. 4 of the deed to treat the deed as null and void and of no effect.

On The Two Questions

It is part of the agreed facts that prior to executing the deed on 28 July 1984, the following were already submitted to Sandakan Municipal Council namely:

(1) Layout & Subdivision Plan (S1182/1B) which was approved in principle on 8 July 1982 and approved on 5 April 1983;

(2) Earth moving, Road Retaining Wall Layout Plan (S1182/2B) which was approved on 5 April 1983;

(3) Structural & Engineering Plans for the infrastructures (S1182/3 to S1182 15) which were approved on 12 May 1983 and on 4 February 1985;

(4) Site & Locality Plan Semi-detached houses (S1182/1/1A) which plan was approved on 27 June 1983 and on 19 June 1984;

(5) Building Plans for Semi-detached houses (S1182/1/2A to S1182/1/4A) which were approved on 27 June 1983 and on 19 June 1984;

(6) Site & Locality Plan for Terraced houses (S1182/2/1A) which plan was approved on 23 June 1983 and on 19 June 1984; and

(7) Building Plans for terraced houses (S1182/22A to S1182/2/5A which plans were approved on 23 June 1983 and on 19 June 1984.

Be it noted that there was delay in D1 applying for approval of the engineering plan and also in applying for permission to commence work. The engineering plan was approved on 4 February 1985. D1 only applied for permission to commence building works on 21 July 1986 which was about 1 1/2 years after expiry of six months from the date of the deed. Clause 4 of the deed expressly provide for the approval of the plans to be obtained within six months from date of the deed.

On the first question, the finding of the learned judge was that the expression "final approval for the development of Phase I project" appearing in cl. 4 of the deed should be taken to mean approval by the council of all plans including structural and engineering plan.

With regard to the second question, the finding of the learned judge was in the negative on the premise that if the finding were to be otherwise, it would tantamount to allowing D1 to take advantage of its own wrong (see *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC (refd).

At the hearing of this appeal, no attempt was made by the appellants (the defendants) to argue against the finding of the learned judge on the two questions. Instead, for the appellants, it was submitted that, notwithstanding the finding of the learned judge on the two questions, full trial was necessary to try the other issues.

In response to the appellants' submission, the learned counsel for the respondent ("plaintiff) submitted that the learned judge was right in substantially disposing the whole action after having considered the two questions of law. In the judgment of the learned judge at p. 39 of AR, it states:

> I am of the opinion, therefore, that the 1st Defendant by not taking the necessary steps which it was required to take under Clause 4 committed a breach of duty owed to the Plaintiff.

For ease of reference, cl. 4 of the deed is reproduced below:

> 4. The Land Owner hereby agrees to allow the Developer a period of six (6) months from the date hereof to obtain from the relevant authorities the final approval for the development of the Phase I project. If the Developer fails to do so within the aforesaid period the said property shall revert back to the Land Owner whereupon this Agreement and all relevant documents guarantee and power of attorney created pursuant to this Agreement shall terminate and be deemed to be null and void and of no effect. In such event the Developer shall execute all documents necessary to facilitate the return and retransfer to the Land Owner of the title to the said property free from all encumbrances.

From the facts and surrounding circumstances, it is abundantly clear that D1 had failed to take necessary actions as envisaged under cl. 4 of the deed. In *Everett v. Ribbands* [1952] 1 All ER 823 at p. 827, Romer LJ said:

> **Where there is a point of law which, if decided in one way, is going to be decisive of the litigation**, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards. (emphasis added)

Thus, in view of the foregoing, we agree with the learned judge that it was not necessary for the court below to conduct a full trial to try the other issues on the basis that D1 was in breach of cl. 4 of the deed.

In the premise and for reasons abovestated, we dismiss the appeal with costs. Further, we order the deposit to be paid to the respondent towards account of taxed costs.